EXHIBIT I

Gary P. Naftalis
Stephen M. Sinaiko
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Attorneys for Rajat K. Gupta

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	No. 11 Cr. 907 (JSR)
- against -	ECF Case
RAJAT K. GUPTA,	Declaration of Stephen M. Sinaiko
Defendant.	

Stephen M. Sinaiko, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a member of Kramer Levin Naftalis & Frankel LLP, attorneys for defendant Rajat K. Gupta in this action, and respectfully submit this declaration in support of Mr. Gupta's motion for an order dismissing Count Two of the superseding indictment for failure sufficiently to allege an offense, pursuant to Fed. R. Crim. P. 7(c); striking prejudicial surplusage from the superseding indictment, pursuant to Fed. R. Crim. P. 7(d); and directing the government to produce a bill of particulars, pursuant to Fed. R. Crim. P. 7(f). The sole purpose of this declaration is to place before the Court true copies of documents relevant to the disposition of Mr. Gupta's motion.

2. Attached as Exhibit A is a true copy of the transcript of proceedings before the Court in this action on January 5, 2012.

3. Attached as Exhibit B is a true copy of the original indictment in this action, filed on October 25, 2011.

4. Attached as Exhibit C is a true copy of the superseding indictment in this action, filed on January 31, 2012.

5. Attached as Exhibit D is a true copy of the transcript of proceedings before the Court in this action on February 7, 2012.

6. Attached as Exhibit E is a true copy of an order dated July 24, 2005 in *United States v. Solovey*, No. 04-cr-244S (W.D.N.Y.).

7. Attached as Exhibit F is a true copy of Mr. Gupta's request for particulars dated November 17, 2011.

8. Attached as Exhibit G is a true copy of Mr. Gupta's request for particulars with respect to the superseding indictment, filed on February 2, 2012.

9. Attached as Exhibit H is a true copy of the government's response, dated February 6, 2012, to Mr. Gupta's February 2, 2012 request for particulars.

* * * *

10. For the reasons set forth in our accompanying memorandum of law, we respectfully request that the Court grant Mr. Gupta's motion in full.

11. I declare under the penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
February 21, 2012

/s/ Stephen M. Sinaiko
Stephen M. Sinaiko

EXHIBIT A

1215egupc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v.

RAJAT GUPTA,

Defendant.

----------x

New York, N.Y.

11 CR 907(JSR)

January 5, 2012
3:25 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: REED M. BRODSKY
RICHARD TARLOWE
Assistant United States Attorneys

KRAMER LEVIN NAFTALIS & FRANKEL, LLP
Attorneys for Defendant
BY: GARY P. NAFTALIS
DAVID S. FRANKEL
ROBIN WILCOX

(In open court)

THE DEPUTY CLERK: Will the parties please identify themselves for the record and be seated.

MR. TARLOWE: Good afternoon, your Honor. Richard Tarlowe and Reed Brodsky for the government. Also with us at counsel table is Sean Fernandez, a paralegal in our office.

MR. NAFTALIS: Good afternoon, your Honor. Gary Naftalis for Mr. Gupta, and David Frankel and Robin Wilcox with me at the table.

THE COURT: Good afternoon.

All right. So I just want to make clear so no one is under any misapprehension, a number of motions have been filed by the defendant. No responses have been filed by the government because they were not required to file any responses at this time.

My practice is that after the defense files their motions, we then convene a conference; that's today's conference. And if there are motions that can be dealt with simply as a matter of oral argument, they will be. But if there are motions that require a written response, then we will have the written response, and only then will I resolve the motions.

I mention that because I think there are probably some motions here today that may require a written response. But the first of the motions, taken in no particular order, is a

motion to dismiss or consolidate certain allegedly multiplicitas counts.

And before we get into that, the government in a joint telephone conference with the Court and defense counsel some weeks ago indicated that if there was to be a superseding indictment, it would be filed by the end of January.

So let me ask the government: Is there going to be a superseding indictment, assuming the grand jury votes one?

MR. TARLOWE: Final decision on that has not been made. I think it's fair to say it's more likely than not that there will be a superseding indictment.

THE COURT: Okay. So it seems to me -- I'm not sure that as a matter of law these counts are multiplicitas, but I also -- it seems to me that maybe it doesn't make that much sense to have these trades that really derive from the same conversation allegedly broken into several different counts. I'm not expressing more than simply some concern for simplifying the case when it goes to the jury. So the government may want to take that into account in any superseding indictment. But I don't see any reason why I should reach this motion now, if there is more likely than not going to be a superseding indictment.

Assuming there is a superseding indictment, then the government, if it wishes to be heard on this particular motion, which -- I'm sorry. Assuming there's a superseding indictment,

and assuming it includes these same counts or ones that raise the same basic issue, the government can then put in their response in writing no later than the week after the superseding indictment comes down. And I will then resolve the matter on the papers very promptly.

So is there anything anyone else wants to say on that motion before we go to the next motion?

MR. NAFTALIS: Assuming that the government doesn't heed your Honor's suggestion by narrowing the charges and continues to proceed and, therefore, file, could we have some time to take a reply to their response? Brief, brief, brief.

THE COURT: Yeah. Three business days after the government's papers.

MR. NAFTALIS: Thank you, your Honor.

THE COURT: I must say, I do think this is a little bit a tempest in a teapot either way, because from the way any jury would look at it -- and assuming for the sake of argument the way any sentencing judge would look at it -- it's not really going to matter one way or the other. That's not the test. The test is not an equitable one, if you will. But it didn't seem to me to be of that great moment one way or the other.

Anything the government want to say?

MR. TARLOWE: Just very briefly, your Honor. I just wanted to point out, there is a somewhat recent Second Circuit

case from a few years ago, United States v. Josephberg that I think the defendants did not cite. But in Josephberg the Second Circuit actually reversed a district court's pretrial dismissal of multiplicitas counts, holding that that issue really did not become ripe until after conviction, at which time the Court had been dealing with the double jeopardy issue by not entering judgment on the multiplicitas counts. And so in light of that case, I think it's --

THE COURT: Well, you're saying that so on that theory I should not only postpone it the way I just did, but I should continue to postpone it for several months thereafter.

I'll look at that case. I'm certainly grateful for any help the Second Circuit can give me in avoiding having to rule on anything. So thank you.

MR. NAFTALIS: See, this is the first they've mentioned that, obviously, to us as well. So if they could -- they don't have to do it now. They could give us the citation to that.

THE COURT: Do you have the citation?

MR. TARLOWE: I do. It's 459 F.3d 350.

THE COURT: Okay.

MR. NAFTALIS: And that was not an insider trading case, I take it?

MR. TARLOWE: I believe that's correct.

THE COURT: It's a little different, as I understand

the defense argument from the usually submission, if you had a mail fraud scheme and you had 100 mailings all based on the same false statement that the two conspirators had agreed to put in the mailings, you could still have 100 counts. That would not be multiplicitas.

But here, as I understand it, there's a single tip. And then just by happenstance, the trading was divided into either two or, depending on the tip, a number of occasions as opposed to it all could have been done as one on each of those particular tips. As I say, I don't have a strong feeling about it, but I'm certainly glad that everyone is going to spin their wheels on this.

So, the next motion, which I think we can deal with orally today, is the motion to strike surplusage. The specific language that the defense wishes to strike is in paragraph 11(c) of the indictment, which says, quote, Rajaratnam in turn, knowing that Gupta had disclosed the inside information to him in violation of duties of trust and confidence, caused the execution of transactions in the securities of Goldman Sachs, P&G and other companies on the basis of the inside information, etc.

And it's the words "and other companies" that the defendant wishes to strike. This is separate and apart from whether as a matter of bill of particulars the defendant has a right to know what those other companies are. It's a question,

and under this motion, of whether that is surplusage. It doesn't certainly sound like surplusage or look like surplusage as one normally sees it.

But let me hear from the government on this, and then we'll hear from defense counsel in rebuttal.

MR. TARLOWE: I think we agree with the Court's assessment. I think the cases say that surplusage should be stricken if it's inflammatory or unfairly prejudicial. It doesn't seem to us that there is anything about that language that is prejudicial in any way.

THE COURT: Well, there's that. That's number one.

And number two, though, there's the argument that if there was no other companies presented to the grand jury, then it was surplusage in the sense of going beyond what the grand jury had a basis for voting.

MR. TARLOWE: I think there are a couple of responses to that. I think, one, evidence was presented to the grand jury, so their speculation on that point is just not accurate.

But also I think it sort of miscomprehends the function of an indictment where there's a conspiracy charge. I think the law says an indictment doesn't even need to recite any of the overt acts. So certainly the government is not limited at trial to presenting proof or evidence of only overt acts that are specified in the indictment.

THE COURT: No, that's right, but that's not the

point. That would go to any objection if the indictment did not say and other companies and you sought to produce evidence of other companies. And that would be an interesting issue in itself. That sort of relates to the bill of particulars issue.

But the issue in surplusage is not the argument that you're making that you aren't required to put this in; it's the argument having put it in, is it surplusage? So, you know, if a classic surplusage, as you point out, you know, is in effect -- something like that Mr. Jones burnt down that building. Indeed, he lit a match and knowingly burned it down. In fact, on the evening of January 4th, he completely burned down that building, etc., etc. That would be a classic surplusage.

Or another thing would be Mr. Jones, who was well known for beating his wife, burnt down that building. That would be surplusage of a different type. This doesn't seem to fall into those kind of familiar categories.

But let me hear from defense counsel.

MR. NAFTALIS: If your Honor please, I think here this is classic prejudicial surplusage which Judge Weinfeld in the seminal Pope case talked about, because we're not talking about scandalous material or things like that, which your Honor can deal with by not sending the document to the jury, and that -- which I know is your practice.

THE COURT: I think I mentioned previously I never

send the indictment to the jury.

MR. NAFTALIS: Here, what you have here, as Judge Weinfeld says in the Pope case, is the impermissible delegation of authority to the prosecution to enlarge the charges contained in the indictment. And he rejected the notion, oh, you can clean this up by a bill of particulars. He said, quote, according to Judge Weinfeld, a bill of particulars would permit the prosecution to go beyond the grand jury accusation as set forth in the indictment.

THE COURT: Forgive me for interrupting. That whole argument goes to whether what was presented to the grand jury. The assistant has just represented other companies represented just --

MR. NAFTALIS: I got to tell you that's news to us. And I mean no disrespect to the assistant here, because this case is a little unusual than a lot of cases because we had extensive dialogue with the government about what was being investigated. And we made extensive presentations of documents and presentations dealing with what was under investigation in this case.

And the notion that there was anything other than Goldman Sachs and Procter & Gamble was never -- the word was never uttered in anything. Indeed, with all respect to the government, they define inside information in this indictment as Goldman Sachs and Procter & Gamble only, nobody else. And

I'll find that for you, your Honor.

THE COURT: Well, that would be helpful.

While you're finding that, and maybe this is jumping ahead to the bill of particulars, why wouldn't this issue be satisfied by their defining a bill of particulars what the other companies were if they were limited to those that were presented to the grand jury?

MR. NAFTALIS: Well, paragraph 11 of the indictment defines inside information. And I'm going to pull it out for your Honor. It says, the insider trading scheme from in or about '08 through January of '09, they participated -- Gupta and Rajaratnam participated in a scheme to defraud by disclosing material, nonpublic information relating to Goldman Sachs and P&G, paren, quote, the inside information, closed quote.

THE COURT: All right. Well, let me go back to --

MR. NAFTALIS: And --

THE COURT: Hold on just one second. Let me go back to the government --

MR. NAFTALIS: Could I just -- I'll come back.

MR. TARLOWE: I think we can actually short-circuit all this. To be clear, the other companies should actually be singular. There's one other company. I'll disclose now what it is, and I don't think it's going to come as a surprise to Mr. Naftalis. The other company is the JM Smucker company. I

don't think that's a surprise to Mr. Naftalis.

In fact, in one of their letters to us requesting Brady material, one of the requests they made relates to, and I quote, trading in the securities of P&G or the JM Smucker company. So, again, it's not a surprise to anybody, that having been disclosed that that is the other company.

THE COURT: So that, if you are going to supersede, then maybe the thing to do is just spell that out, and then no one will be left to speculate.

MR. TARLOWE: I think that's a very good suggestion.

THE COURT: Okay. So, Mr. Naftalis, it sounds to me like -- and I take it the representation is that something regarding that company was presented to the grand jury?

MR. TARLOWE: That's correct, your Honor.

THE COURT: All right. So it doesn't sound like it's surplusage, given these representations. I understand that you've come up with a grammatical inconsistency -- arguable grammatical, although I don't know if that's true; depends on -- I need to know more -- with what is the government's theory with respect to the trading -- the company is?

MR. TARLOWE: JM Smucker Company, commonly known as Smucker's. In or about June of 2008 Procter & Gamble sold its Folgers Coffee business to the JM Smucker company. And the allegation is that Mr. Gupta disclosed information about that transaction before it was public to Mr. Rajaratnam.

THE COURT: Okay. So?

MR. NAFTALIS: So companies plural just means Smucker's?

THE COURT: That's what he's saying, correct?

MR. TARLOWE: That's correct.

THE COURT: Okay. So I think we've -- I don't know whether I granted or denied that motion. I think we resolved it.

MR. NAFTALIS: I think you clarified it.

THE COURT: All right. Turning to the motion for a bill of particulars -- and I am not going to spend time on the -- I was going to call it a cat fight, but that's the term that I had to use with caution, in light of a different opinion I recently issued -- over the battle over whether the government has or has not responded to requests for information from the defense.

The things that the defense wants to know, at least the ones that seem to me to be salient, are the alleged benefit that Gupta received in exchange for passing inside information, the identities of the alleged coconspirators, the other companies which we've now dealt with and the specific duties and obligations Gupta is accused of breaching.

I have grave doubts that that last one falls within anything that a bill of particulars is designed to address, but the others sound to me at least what is commonly granted in a

bill of particulars.

Let me find out what the government's position is, and I'm talking about on the identities of coconspirators and on the alleged benefit that Gupta received in exchange for passing inside information.

MR. TARLOWE: Your Honor, with respect to the identities of the coconspirators, that is something that we have agreed to provide and we intend to provide.

THE COURT: You want to put a date on that?

MR. TARLOWE: What we suggested to defense counsel, which we think is a reasonable schedule and is consistent with what your Honor has done in other recent insider trading cases, is that we would provide that, along with any other particulars, on February 15th, which is two weeks after the deadline for filing the superseding indictment and almost a full -- just short of two months before trial, recognizing that there may be a need to amend that as we get closer to trial and we are immersed in trial preparation. We propose that we would submit any amendments two weeks in advance of trial.

THE COURT: All right. Before we hear from the defense, what about the benefit?

MR. TARLOWE: Well, as to the benefit, our position is that the benefit -- we have described the benefit in the indictment, and we think the way we've described it is sufficient, and that anything beyond that --

THE COURT: Point me to that.

MR. TARLOWE: Absolutely. Paragraph 25 is the principal paragraph, and then also paragraph eight provides some additional detail.

THE COURT: All right. 25 reads, quote, Rajat K. Gupta, the defendant, provided inside information to Rajaratnam because of Gupta's friendship and business relationships with Rajaratnam. Gupta benefited and hoped to benefit on his friendship and business relationships with Rajaratnam in various ways, some of which were financial.

So it's that second sentence that the defense wants some particularization about.

In paragraph eight it does give some of the particulars but also raises some of the same concerns: Quote, at all times relevant to this indictment Rajat K. Gupta, the defendant, and Rajaratnam had numerous business dealings with each other. In addition, Gupta and Rajaratnam maintained a personal relationship and friendship. Their business dealings included the following. And then there are four specifications, if you will, of business dealings.

So, let me go back to defense counsel. First, as to coconspirators, they're going to give you that. They propose a schedule. Let me hear from you on that first.

MR. NAFTALIS: Yes. There is no justifiable reason for them not to provide this information now. Originally,

without getting into the problems we've had in getting them to respond to things, they promised that to us on December 2nd. It was only on the eve of -- and then they never delivered on their promise. And then, you know, then on the eve of this -- right before the weekend, they wrote a letter saying, we'll now give it to you February 15th.

They know those names. It's no big secret who the unindicted coconspirators are. Indeed, in this case they tried much of this case once already against Mr. Rajaratnam. The Goldman Sachs allegations were the subject of the Rajaratnam trial, so they know who the coconspirators are. There's no reason for them to play ducks and drakes over this with us. They can tell us to it now.

The reason we need those names, those names are people who are potential witnesses. We want to know who we have to interview, as opposed to being jammed, you know, late in the trial prep. This is no big imposition on them. They should be able to give this information to us now so we can defend ourselves.

THE COURT: I'm going to order that those disclosures be made on essentially the same schedule that I set for other things, like the witness list and so forth. So the names of the coconspirators have to be disclosed in writing by February 9th. And if there are additions -- and I, frankly, don't expect there to be additions, barring something truly

unusual, given the time that the government has had to review this case. If there are additions, they need to be provided three weeks before trial.

Now, let me go back to defense counsel on the -- what more do you want on or do you think you're entitled to under -- on the benefit issue?

MR. NAFTALIS: The answer is we would like to know what the allegation truly is, other than this vague, you know, mumbo jumbo here.

Your Honor, this is a case which is different than most insider trading cases. Indeed, it's different than any insider trading case of which I'm aware. There may be others who are aware of things. Our client didn't trade. That's undisputed. He had no profit sharing arrangement with Mr.Rajaratnam. There was no kickback. None of those things are alleged. And I think they're all fairly undisputed.

So the issue here of what is -- so in this case where -- in this case this benefit is an element of the offense --

THE COURT: It is. But for better or for worse, the Second Circuit has indicated that unfairly vague benefits can qualify, like friendship.

So supposing some hypothetical defendant wrote in his or her diary, I disclosed information to Jones today because I'm trying to cultivate a personal and business relationship

with him, and I think I will get the benefit of that from this disclosure. What more could you specify? The nature of some of the -- of this relationship, at least as alleged, the nature of this benefit, at least as alleged, may be inherently too vague to be particularized in any greater degree than the indictment has. On the business side, they do particularize the previous business relationships.

So I'm not quite sure what it is you want from them that they could reasonably be asked to provide in this sort of inherently somewhat amorphous situation.

MR. NAFTALIS: Your Honor, the prior business relationships which they spell out, for whatever admissibility or value they may have in the case, really have nothing to do with our request and nothing to do with their allegation, because their allegation says -- which is the second sentence of paragraph 25 -- it said he benefited and hoped to benefit in various ways, undefined, some of which were financial.

We would like to know, what's their theory? What's their allegation there? They make an allegation -- that sentence is useless in terms of trying to defend this case. It is useless in terms of giving us any information. It says, one of the various ways that we hope to benefit and actually benefited, quote, some of which were financial. Okay. What were the financial benefits that they allegedly got as a result of tipping him? It's a simple question. I'm sorry, Judge.

THE COURT: No, no, that's all right. My daughters never let me finish a sentence. Why should lawyers be any different?

But let me ask the government. I agree that the sentence, the second sentence of 25, is the problematic sentence. What about that?

MR. TARLOWE: Your Honor, I think what your Honor has said in other cases is the government should identify generally what the theory is. Is it a friendship? Is it a financial benefit? Here it's really both. And we've laid that out in paragraph 25 with some additional detail in paragraph eight. I don't think --

THE COURT: Paragraph eight is the prior business relationships, yes?

MR. TARLOWE: I think some of them are ongoing relationships that extended into the period of time, into the conspiracy.

THE COURT: Well, let's take that second sentence at paragraph 25 and break it down. Gupta benefited -- take that before we get to hoped to benefit -- from his friendship and business relation with Rajaratnam, and in various ways, some of which were financial.

So what were the financial benefits? This is what I think is at the heart of what defense counsel has just asked. Friendship stuff may be amorphous, but what is the financial

benefit that Mr. Gupta received from giving this inside information allegedly to Mr.Rajaratnam?

MR. TARLOWE: And, your Honor, I think, respectfully, I think that's the type of information that goes beyond the purpose of a bill of particulars, which is, as the Court is well aware, is -- a bill of particulars is only required where the charges are so general that they did not advise the defendant of the specific acts of which he is accused. I don't think anyone could possibly make the claim credibly in this case that the defendant --

THE COURT: I'm not sure I agree with that, because we're talking about an essential element here. And the purpose of bill of particulars -- it has two purposes. One is to provide fair notice. The other is to allow the invocation of double jeopardy.

And focusing on the fair notice requirement, if you don't give the defendant fair notice of what you mean constitutes an essential element of the charge, that quite often is where a bill of particulars is required.

MR. TARLOWE: And I certainly think if we said nothing about benefit, that would be the case. But we have explained or described what the benefit alleged was.

THE COURT: What was the financial benefit?

MR. TARLOWE: It stems from his business relationships with Rajaratnam. The defendant certainly knows what

relationships he had with Rajaratnam.

THE COURT: No, no, no. It's never a response to say, well, defendant knows -- we charged him with robbing a bank. He knows how he robbed the bank. That turns the presumption of innocence on its head.

The question is: What is the financial benefit that you intend to prove? The friendship benefit, I agree with you, I don't know that that can be reduced to anything more specific. But the financial benefit I think can.

MR. TARLOWE: In that case, your Honor, then I would propose that we include that information in our letter or the other information we provide on February 9th.

THE COURT: All right. Mr. Naftalis?

MR. NAFTALIS: Your Honor, we're on a very tight trial schedule. There is no -- they know what the allegation is. We have to defend this. Especially in this case, where they're lacking, as far as we're concerned, any evidence of our client profiting whatsoever from this, which casts real doubt on the credibility of their case. We need to prepare to defend ourselves. We've been asking for this information from them since November. And I'm not going to go into the fact that we don't get anything else, but why can't they give us this now as opposed to making us wait another month?

They know the answer to this question. They could give it to us this afternoon or tomorrow or next Monday or a

week, whatever your Honor thinks is reasonable, so we can go out and know what the allegation is and so we can defend ourselves, so we can do whatever investigative work needs to be done, talk to whatever witnesses. I mean, we want to --

THE COURT: Well, but two months before trial still provides you with very substantial time. Mr. Gupta is represented by illustrious counsel. He has substantial resources.

But here is what I will do: I will encourage the government in a superseding indictment to be more specific about any financial benefits, either received or hoped to be received, but I will not require that. But I will require that they spell them out with reasonable specificity in the providing of information that they are required to provide on February 9th. So February 9th will be the drop dead date, but I encourage the government to do even better than that by putting it into the superseding indictment.

All right. The next motion is to compel the government to respond to the defendant's Brady requests, which include requests for false statements of government witnesses; witness statements that Gupta was not the source of any inside information, somebody else was; FINRA and SEC investigations of the trading in the indictment; information showing me information that Gupta was considering purchasing a commercial bank, that that information was already public; information

regarding that the so-called or allegedly deteriorating relationship between Gupta and Rajaratnam and exculpatory proffers by other witnesses.

So let me hear the government.

MR. BRODSKY: Your Honor, they sent us a list of approximately 25 items asking for Brady material.

Let me state first, very clearly for Mr. Naftalis -- I think we've told it to him in the past but I'll say it very clearly -- we have no evidence whatsoever that anybody but Mr. Gupta tipped Mr. Rajaratnam regarding Goldman Sachs' earnings, regarding Procter & Gamble's earnings, regarding Procter & Gamble's sales of Folgers to the JM Smucker company and regarding Mr. Warren Buffett's investment in the Goldman Sachs. We don't have any information anybody other than Mr. Gupta made those tips.

Now, we did produce documents to Mr. Naftalis. We produced wiretaps. We produced other forms of evidence in discovery already that relate to some of their defenses that they came to our office prior to charging and brought to us. And we did gather documents relating to those so-called defenses; for example, relating to the nature of the relationship between Mr. Rajaratnam and Mr. Gupta. And we've produced documents and wiretaps and other information relating to that.

There is a category of information that they've

requested which we don't believe is called for by Brady or Giglio in any way, and we could go through each of those requests. For example, they've asked us to produce any statement or statements of any witness who says he or she is not aware of any wrongdoing by Mr. Gupta. In our view, if we talked to a witness who says, I don't know anything about anything relating to Mr. Gupta, that's not Brady.

That's not Giglio if you don't intend to call that witness. Even if we did intend to call that witness, it wouldn't be Giglio; it would be a summary of their statements. So we don't think we should produce that.

They've asked us to produce, for example, correspondence the SEC has received relating to some whistleblower. We haven't received any such correspondence. We don't have it in our possession. We shouldn't be asked to produce documents that aren't in our possession. I know they've asked the SEC for such documents. So there are a category of documents that we simply can't produce because we don't agree with their characterization that it would be Brady.

Finally, there's a third category which are essentially what we believe are Giglio materials, statements of our witnesses that -- or, for example, Neil Kumar will be a witness at the trial. It's no secret to Mr. Naftalis or Mr. Gupta. And Mr. Kumar has Giglio material relating to his activities, statements he's made about his own tips to

Mr. Rajaratnam. We planned on producing that information at the time of the 3500 material deadline. So I'm not --

THE COURT: Which is three weeks before trial.

MR. BRODSKY: Which is three weeks before trial.

THE COURT: Considerably earlier than under the law the defense would be entitled to it, but the government was kind enough to consent to that.

MR. BRODSKY: Yes.

There is a category, your Honor --

THE COURT: I have one quibble with what you're saying so far, which is, as I've had occasion to point out without success for many years now, it's really Giglio.

MR. BRODSKY: I think I heard you say it in this very courtroom.

There's a few other categories, your Honor, I'm happy to go through it, where they sent us a letter asking for, for example, whether any participant in an October 23, 2008, Goldman Sachs board call doesn't recall whether or not the board was informed that Goldman Sachs was losing approximately $2 a share at that time in the quarter. We don't think it's Brady to inform them whether or not a board member does not recall what took place during a board meeting. I don't see how that --

THE COURT: So, well, I mean, what it comes down to is this: I don't think you can -- and I don't suggest that you

are -- fault the defense for making these requests because under the law there is a heightened burden on the government if the defense makes a specific Brady request. So they're making it as specific as they can be.

You're saying, I think with some force, that certain of the things they're asking for just aren't Brady, or are not within your requirement to locate or respond to and so forth. So I think what they're entitled to initially is to have that put down in writing with equal specificity, corresponding to each of their requests.

Now, where does that stand? You weren't required to put in any papers here today. Did you respond in writing to their earlier request?

MR. BRODSKY: We have not responded in writing to their eight-page letter with 25 requests. We can group and number them together and call them Giglio and tell them we'll be producing -- Giglio.

THE COURT: You can call it what you want.

MR. BRODSKY: We can call them 3500 material and tell them we'll produce it during the 3500 deadline. And we can do that with some of their other requests, if your Honor would like.

THE COURT: I think they are certainly entitled to a written response, a detailed written response to their request. And I think they're entitled to it by no later than a week from

today. If, after receiving that response, the defense then wants to contest your response, you should jointly call and we'll set up a very quick, within probably about 48 hours, conference here in court to resolve those differences.

But now, there may be, from the things you just said, some things that defense wants to contest right now. But otherwise, I think we need the written response from the government before I can really rule on those.

Anything further from the defense?

MR. NAFTALIS: I take it that they'll be responding item by item?

THE COURT: Yes. That's what I am directing them to do.

MR. NAFTALIS: Because, you know, some of -- look, your Honor set a date for Brady by February 9th, as I recall. Am I right?

THE COURT: Yes. And I'm going to resolve this before that. So they're going to get you -- today is the 5th of January. They're going to get you their response by the 12th of January. If, after getting their response, you feel that they're wrong in their response, and I -- you know, my guess is that, human nature being what it is, you will feel that way about at least some of their responses, the two of you will then jointly call chambers and we'll have a day or two later a little hearing just on that. But I think we have to frame the

issue more specifically before we have this -- it will be well before February 9th.

MR. NAFTALIS: Since your Honor foresaw some of the things I would have said, I won't repeat them, at least not too much.

Obviously we had to write the letter because -- to make sure that we didn't just -- the boilerplate response, we know our obligations, then we get nothing that resembles what we understand to be Brady material. Some of the things there -- and what our concern was, I think, as stated in the letter, was our interpretation of your Honor's ruling was not that they had to give us the Brady material only on February 9th.

THE COURT: No.

MR. NAFTALIS: It said by no later than --

THE COURT: Actually, on Brady I think what I said was it varies with the kind of Brady. And that will be true presumably on these more specific requests, too.

So there's one thing where someone who you know they're going to call said something falsely exculpatory about his or her own activities. You don't need a huge amount of advanced notice to make use of that. It's something elsewhere, there's something that requires an investigation independent of anything they're doing.

But I don't see any reason why we can't get this all

fully resolved by the middle of this month, okay?

MR. NAFTALIS: Thank you.

THE COURT: All right. So the last motion, unless I've missed something, is the motion to suppress the wiretaps. And I will ask the government to, if they wish to, put in a written response. I don't want to in any way foreclose the possibility of coming out one way or the other on that motion, but essentially this has been ruled on at great length in the Rajaratnam case by Judge Holwell. I can't remember, but I think it may have also been ruled upon by Judge Sullivan, yes?

MR. BRODSKY: I don't believe Judge -- Judge Sullivan addressed different wiretaps. Some of the issues are overlapping, such as whether wiretaps could be used for wire fraud that covers insider trading activities.

THE COURT: Now, that, of course, you know, this is a different defendant, so he is entitled to be heard on this issue. And he may persuade me either by raising new grounds or by persuading me that Judge Holwell had it wrong. But looking at it realistically, if I were the defense, I would not be too optimistic about this particular motion. So, since this is also, as I understand it, the main issue on appeal in Rajaratnam, the defense would be guilty of malpractice not to make the motion. I mean, they've got to preserve it in that sense. But I'm just trying to deal with the practicalities in the situation.

Having said that, I think the government should put in a written response. Can you do that in a week as well?

MR. BRODSKY: I think we would need a little more time than a week, your Honor.

THE COURT: How long do you want for that?

MR. BRODSKY: Two weeks.

THE COURT: Yes. Okay.

And how long, Mr. Naftalis, do you want for reply?

MR. NAFTALIS: Would a week be okay?

THE COURT: Yes. Okay. Then I'll deal with that on the papers without oral argument, unless I feel after reviewing the papers that I need oral argument.

MR. BRODSKY: Your Honor, given the number of issues involved with respect to the wiretaps, may we have permission to have more than 25 pages? We'll try to keep it to 25 pages.

THE COURT: I have no problem with your having more than 25 pages. You're assuming it's likely that I might read more than 25 pages.

MR. BRODSKY: I'm hoping.

THE COURT: That's why I added, whatever you -- how much do you want? We should set a limit, though.

MR. BRODSKY: I think within 40 pages.

THE COURT: Okay, 40 pages.

How long does the defense want for its reply?

MR. NAFTALIS: Could we have 20 pages?

THE COURT: Yes.

Okay. All right. So I think we've dealt with all that we can deal with today, that is, at least in terms of what was presented to the Court. Are there other matters that other counsel wishes to raise?

MR. NAFTALIS: I had just one issue, your Honor, sort of a scheduling issue which was -- I think there was a conference call with your Honor -- not with your Honor, with your Honor's clerk, a couple weeks ago. I apparently wasn't on it. I was learning about how our legislative branch works in Washington. And --

THE COURT: You used the word "works" loosely.

MR. NAFTALIS: Or being worked over. I think your Honor made a ruling regarding disclosure of expert reports.

THE COURT: Yes.

MR. NAFTALIS: And I --

THE COURT: I have that here somewhere. I know I did rule on that. Expert disclosures one month before trial. In other words, March 9th.

MR. NAFTALIS: May I make a request for a modest change in your Honor's scheduling of that?

THE COURT: Go ahead.

MR. NAFTALIS: As I understand the rules, that the defense's obligation to put in an expert report is a reciprocal one after the government has put in theirs.

THE COURT: Well, let's --

MR. NAFTALIS: And --

THE COURT: That depends. I mean, you're raising the right issue, but it's not always the case. The defense sometimes puts in an expert on an issue that's different from what the government's expert is.

MR. NAFTALIS: No, I agree 100 percent. And your Honor has tried a lot more cases than I have.

But what I was suggesting, since apart from the fact that's sort of the intendment of the rules, but secondly, is that whether or not we put in an expert report or whether or not we would go forward with an expert testimony would at least in part be influenced by whether or not the government was coming forward with an expert, because --

THE COURT: I hear you.

MR. NAFTALIS: That's why I think they should go first, is my point.

THE COURT: I understood where you're going.

So my law clerk says, and he has the notes, so he said that my ruling was that the prosecutor had to make their expert report on March 9th, and that the -- I should say the proponent, and then the opponent a week later; or three weeks before trial, to be exact. Three weeks before trial. That's my normal practice. I want to make sure you both understand.

The party who is raising an expert issue and calling

it and seeking to call an expert on that issue has to do the report one month before the trial. The party who is calling an expert simply to respond or filing an expert simply in response to the issue raised by the proponent then has to file their responsive expert report three weeks before trial.

But I don't know why we're talking about this in the abstract. Let me ask the government, and then the defense: Are you planning to call an expert, and if so, on what issue?

MR. BRODSKY: Your Honor, we haven't made a determination. We're leaning against calling an expert, but we are still trying to figure out our process.

THE COURT: If you called an expert against your presentation, do you know what the issue would likely be?

MR. BRODSKY: No.

THE COURT: That sounds to me like it's very likely you won't call an expert, if you don't know what the issue is.

So let me go to defense. Are you planning on calling an expert?

MR. NAFTALIS: I truly don't know if part -- let's start with something that may be hypothetical. If they were calling an expert on some subject, we plainly would call one. So --

THE COURT: That's the whole point of the schedule that I just gave.

MR. NAFTALIS: So would it be an inconvenience for me

to make the possible suggestion that they make a decision on this, say, in the next two weeks, and then advise the Court and us as to whether or not they're going to call one?

THE COURT: I think that's fair.

MR. NAFTALIS: If so, on what subject then --

THE COURT: But both ways. That is to say, if you -- and it's in my experience particularly in insider trading cases, it is the defense much more often than the government that seeks to call an expert, often unsuccessfully; that is to say, often it's not allowed.

And I respect that you don't know at this point whether you're going to do it, but all one has to do is look at the insider trading cases that have occurred in this courthouse in the last year, and you'll see that in virtually every one there was at least an attempt by the defense to call an expert, not by the government.

So I think two weeks from now, I think that's a good date. If each side intends to call an expert, they should so state and say what subject, in a general sense, they're going to call the expert on. That is without prejudice to responsive experts. So if either of you two weeks from today says we're going to call an expert on X, then the other side automatically has permission to call a responsive expert. And that will be, then, the proponent's expert would be due a month before trial and the opponent's would be due three weeks before trial.

MR. NAFTALIS: Most respectfully, I would respectfully submit that the government should be obliged in all respects to go first. And the reason I say that is they have -- this is a criminal case. It's not a civil case. In a civil case, of course, that all makes a great deal of sense. But in a criminal case, it's their burden.

And in terms of they shouldn't be allowed to sit back -- I mean, because we don't have to do anything at the trial, you know. It's been charged a million times. We can just sit there and do nothing and all the rest. But they shouldn't be -- if they're going to call an expert, whether it be -- on the same subject that we would be considering calling an expert, they should go first.

THE COURT: You see, I don't really see that. It seems to me more akin to what is the situation in a criminal case in an affirmative defense, where the defense first has to raise and alert everyone that they have an affirmative defense. And only then is the government obliged often to prove beyond a reasonable doubt that it's not an affirmative defense. If they're in this situation, which I think is, from what the government has just said, more likely than not, that they don't satisfy anything wherein that they can't make out their case beyond a reasonable doubt without calling any expert. So that's why two weeks from today they're not going to list anyone.

But you've already figured out an issue on which you think an expert can put a hole, can create a reasonable doubt in their position or can create some additional issue that you think will carry the day for you, so you say -- so, well, we're going to call an expert on that, and then they'll respond with their expert. I don't see that it's anything relating to the burden of proof.

MR. NAFTALIS: Except their expert would have to be called in their case. And --

THE COURT: Theoretically they could be called in the rebuttal case, if I give them one, which I probably won't. So you'll get the benefit. You'll be in great shape, because even though their expert is responding to your expert, I may require that they go first with that. And how much better could it be for you? You should be salivating.

MR. NAFTALIS: I'm too old to salivate.

Look, obviously we follow whatever your Honor's rules are.

THE COURT: That's the main difference between the lawyers and my daughters. But, yes, I'm going to leave it as it is. I hear what you're saying, but --

MR. NAFTALIS: Look, apparently we know their answer is going to come back they're not calling one. I'm not trying to be -- I'm not trying to put words in my esteemed opponents' mouth, but --

THE COURT: More likely than not.

MR. NAFTALIS: Even I can read the tea leaves. But I think we need more than two weeks to make the judgment on our side as to whether that's something we're going to do.

THE COURT: Okay. Then I'm going to go back to -- I mean, you were the one who was suggesting the two weeks.

MR. NAFTALIS: The problem is sometimes you get what you ask for, right?

THE COURT: So I'm happy to go with the original position, which is no one has to say anything about whether or not they're going to call an expert until a month before trial. The month before trial, someone who's planning to call an expert will make the full disclosures required as to the expert, and then three weeks before trial, if the other sides may call the expert, they make those disclosures for the expert.

MR. NAFTALIS: I withdraw my arguments that went nowhere.

THE COURT: Anything else we need to take care of?

MR. TARLOWE: Just one other relatively small issue, your Honor. I think we really just wanted to seek a clarification from the Court, because the two sides seem to have a very different interpretation of what the Court contemplated with respect to reciprocal Rule 16 discovery.

We've been asking for that from day one, when we began

producing discovery. At the initial conference there was a direction from the Court. As I recall it in the context of discussing 3500 material, the Court ordered the defense to provide reverse disclosures one week before trial. It was our understanding that --

THE COURT: I think it was -- I think it included a witness list and --

MR. TARLOWE: Correct, your Honor. But it was our understanding that that was not intended to suggest that the defense need not produce its Rule 16 reciprocal discovery until one week before trial. We, I think, raised this issue during a conference call with the Court. The Court's order after that was that if the defense is serving subpoenas on third parties and receiving documents, they should produce those documents promptly upon receiving them.

THE COURT: Yes.

MR. TARLOWE: And the defense agrees with that.

But in terms of the Rule 16 reciprocal discovery, as to documents that are already in their possession, they're taking the view that they need not produce those until one week before trial. And we think that's simply just not fair, and that they should begin producing those now. And they can produce them on a rolling basis. But if they got them now, we just don't understand why they would sit on those until one week before trial.

MR. NAFTALIS: First, two things. I think there's a little -- I think there's a little misstatement as to what your Honor ruled on.

When your Honor set the schedule on October 26th, you made a whole bunch of dates. And you said, quote, on the defense side it seems to me that all reverse disclosures contemplated by the rules should be provided one week before trial, except for whether or not the defendant is going to take the stand. And you set up a procedure that we have to tell that at the close of the government's case.

We certainly intend to comply with all of our reverse disclosure obligations, as the Court ruled, including reverse discovery of matters that we intend to put in in our case in chief, as the rule says. Indeed, we have given the government, as part of our preindictment thing, hundreds and hundreds of pages of documents which support defense themes in this case, organized in binders; basically work product we gave them, documents which showed that there was developing -- this goes to one of our Brady points, of the acrimonies at the time.

THE COURT: Maybe they'll ask you for a bill of particulars.

MR. NAFTALIS: In addition, we gave them analysts' reports that they had never seen before which showed that their arguments about July 29th were specious. We've given them a ton of reverse disclosures to start with.

Look, they've dumped two-and-a-half million pages of documents that we had never seen before, and we've been in this case a while. We've seen a lot. And they're continuing to dump documents on us. There have been ten productions running into the hundreds of thousands of pages dumped on us since the November 2nd cut-off, where --

THE COURT: Let me just make sure I understand, because I --

MR. NAFTALIS: We're trying --

THE COURT: What is it that you don't want to produce until a week before?

MR. NAFTALIS: Right now we're trying to get -- two things. One, right now we're just trying to get through the government's discovery to understand what's out there.

Secondly, what we would put in evidence in our case in chief, that's a decision you really kind of make further down the line. We've given them hundreds of pages of stuff already, preindictment.

THE COURT: I'm inclined to stick with the one week, if that's what we're talking about. In other words, if we're talking about, for example, the exhibits that the defense intends to offer on its case, I think one week is sufficient for that purpose.

If there's something else we're talking about, let me hear from the government that -- you know, if I'm missing

something here. But I take it if that's what the fight was about, I think one week is sufficient.

MR. NAFTALIS: And with respect to the -- he mentioned something about the subpoena issue. We've not served any Rule 17 subpoenas in this case. Obviously I know your Honor's practice. When you get things under Rule 17(c), you're supposed to give it to the other side. We certainly intend to comply with that.

THE COURT: Okay.

MR. TARLOWE: Your Honor, on that point, it is our understanding that although they may not serving Rule 17 subpoenas, they are serving subpoenas in the SEC action. And it would seem to us that they can't use that subpoena power in order to circumvent --

THE COURT: Are you going to turn over that stuff as well?

MR. NAFTALIS: Whenever we get it. We've actually -- I can hand up to the Court a letter we sent to Mr. Tarlowe on that, because we advised them -- we've gotten nothing yet in that action. When we do, I'm happy to give that to them.

THE COURT: So that includes the SEC stuff. Okay.

MR. TARLOWE: Your Honor, just on the one week issue on the Rule 16 discovery, Mr. Naftalis said that they produced hundreds of pages to us. So, I mean, should I not expect to be receiving thousands of pages of documents the week before

trial? Because that's what concerns me, frankly. It's what has happened in other cases. I know your Honor in the Jiao case fairly recently directed defense counsel to begin producing the Rule 16 reciprocal discovery four weeks prior to trial.

So I'm just concerned that one week before trial we're going to get a very substantial volume of documents from the defense, including documents that they probably have in their possession today.

THE COURT: Well, the difficulty I think is that the determination by the defense of what they will be offering on their case as exhibits is, I think, one not easily arrived at by any reasonable defense counsel, until and unless he has a pretty good clear sense of what the government's going to be offering. To force that disclosure much before one week before trial is, I think, a very difficult burden for any responsible defense counsel because it requires to make decisions that cannot really be made that far in advance of trial, until everything else has coalesced, so to speak.

Having said that, if the defense has large quantities of documents of many pages, or even if the individual documents are short, the combined number is very, very large that they think there is a reasonable possibility they might offer, I think they should be encouraged strongly to turn those over in advance. They don't have to make the final decision on those

until the week before trial. But it gives the government at least the opportunity to begin to assess those. And, frankly, I don't see how it could possibly prejudice the defense, considering I have to make my final decision at that point. And, you know, if anything, it might require the government to go check out documents that will prove in the end to be irrelevant to the case. So the prejudice would be to the government, if anything, rather than to the defense.

But I'm not going to set at this stage a specific requirement beyond the schedule I've already set. If it turns out, if the government reports to me that one week before trial 50,000 pages were dumped on them that they have never seen before, I will be inclined to take appropriate action to deal with that situation. But I'm not going to require anything at this point, because I don't know, and I'm not sure a responsible defense counsel knows at this point exactly even the ballpark of what he might put into evidence or not.

So I'm going to leave it in that amorphous form for now, without prejudice to the government coming back to me and complaining bitterly, and with reason, if they get a huge amount of materials dumped on them a week before trial.

Yes.

MR. BRODSKY: Your Honor, one other clarifying point regarding the defense exhibits a week before trial.

In a different -- in another insider trading case that

I did recently, the defense took the position that there was an exception to that; that if they were offering documents that they planned to introduce into evidence but they planned on offering it through cross-examination, as opposed to their own case in chief, they said to Judge Sullivan that that was an exception that didn't fall within the one-week disclosure period or the pretrial disclosure period in that case for defense exhibits. And we took another position.

Judge Sullivan ruled for the government and said if the defendant was planning on introducing exhibits through the government's witnesses, that constitutes defense exhibits and should also be produced one week before trial.

We would ask your Honor to adopt that position. Otherwise, the defense will be offering all sorts of exhibits through our witnesses and never disclosing them before trial.

THE COURT: I think the argument -- I don't know what occurred before Judge Sullivan. I think the argument is slightly more refined. If the defense is introducing a document for its truth, then I think it has to be -- and they know they're going to be offering it, whether it's through a government witness, a defense witness or some other way, like a self-authenticating document, those have to be produced a week before.

If the defense is claiming to use a document solely for impeachment purposes, not offering it for its truth, that,

I think, can be held back. That's really critical to the impeachment function of cross-examination. So that's my point.

All right. Very good. Anything else? Good. Thanks so much.

(Adjourned)